



Commonwealth  
of Massachusetts

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Advisory Opinion

October 25, 2006  
AO-06-09

Georgia Hollister Isman, Political Director  
Mass Alliance  
8 Beacon Street, 4<sup>th</sup> Floor  
Boston, MA 02108

Re: Issue Advocacy and Coordination with State Candidate Campaigns

Dear Ms. Isman:

This letter is in response to your September 28, 2006 request for an advisory opinion.

You have stated that Mass Alliance endorses candidates. Prior to endorsing non-incumbent candidates, the organization asks candidates about their stances on issues and also asks a few basic questions about their campaign for the limited purpose of assessing the campaign's viability, e.g., how much the campaign plans to raise, how much it has raised so far, what sort of groups the campaign has strong support from, whether the campaign has hired staff, how many volunteers the campaign has, and if the campaign has started to identify supporters. In contrast, a decision on whether to endorse incumbents is based not on asking the incumbent these questions, but solely on an assessment of the incumbent's record.

You are the sole employee of Mass Alliance. For many of the candidates endorsed by the organization, you ultimately do coordinated work with the candidate's campaign, ranging from writing press releases to spending days working directly on the campaign. You understand that, because you are paid by Mass Alliance, providing such coordinated services for a candidate results in Mass Alliance providing in-kind contributions to the candidate. See IB-06-01. You have asked two questions, however, relating to the extent to which you or Mass Alliance board members may be involved in issue advocacy supporting candidates who have been endorsed by Mass Alliance.

QUESTIONS

1. May Mass Alliance board members, who have not worked with a candidate or been involved in interviewing the candidate, create or design issue advocacy mail supporting the candidate that would be paid for by Mass Alliance? In

accordance with a written policy to be implemented by Mass Alliance, the candidate and his campaign would not consult with the board members about the candidate's strategy, needs or goals, or the content of or audience for the mail, and you would not tell the board members about the wants or needs of the candidate's campaign that you may have learned of while you provided coordinated services for the candidate.

*Answer: Board members may create issue advocacy mail that is not coordinated with a candidate's campaign, provided that a "firewall" is created between you and the board members that would comply with our guidance in AO-06-07.*

*Because you are the sole employee of Mass Alliance, an effective firewall may be difficult to create. If facts suggest that an expenditure by Mass Alliance for issue advocacy is coordinated, the expenditure would involve the making of an in-kind contribution by Mass Alliance.*

2. May you design and send out issue advocacy mail for an endorsed candidate (whether incumbent or non-incumbent) in the districts where you have done no coordinated work and have had no contact with the candidate or his campaign since the candidate was endorsed?

*Answer: Yes, if you do not coordinate the design or distribution of the issue advocacy mail with the candidate.*

#### DISCUSSION:

##### 1. Creation or design of issue ads by board members

An organization's payment for a coordinated communication is an in-kind contribution to the candidate's committee with which it coordinated the expenditure and must be reported as an in-kind contribution by the benefited committee, and would be subject to the limits on such contributions. See IB-06-01.

OCPF recently issued an advisory opinion, AO-06-07, stating that an organization may create a "firewall" to allow the organization to make independent expenditures while at the same time making coordinated in-kind contributions. Such a firewall prevents the flow of information from those within the organization who are involved in the making of coordinated expenditures to those who arrange for the independent expenditures. If a firewall is in place, absent facts suggesting that information has been shared to make the issue ad notwithstanding the firewall, an organization such as Mass Alliance may be involved in providing both coordinated expenditures and independent issue advocacy.

A firewall may also allow an organization to make independent expenditures for issue ads while at the same time making coordinated expenditures. As discussed on pages 7-9 of IB-06-01, where a communication that relates to a candidate's nomination is "coordinated," the office would consider the coordinated communication, even if it might be described as issue advocacy, to involve the receipt of an in-kind contribution by the candidate subject to the

disclosure requirements and limits of the Massachusetts campaign finance law. The determination of whether a communication is coordinated and should be treated as an in-kind contribution requires consideration of a number of factors, mostly relating to whether there are facts indicating that the organization and a candidate, in preparing and distributing the communication, are working together. See IB-06-01, page 8 and AO-06-07, in which the office stated:

Where an organization plans to make both coordinated and independent expenditures on behalf of a candidate, the organization must ensure that the independent expenditures are truly independent of the candidate, his or her committee and agents of the candidate and committee. (See Section 18A). This may be a difficult task, but it is not insurmountable. To make both coordinated and independent expenditures, while making sure that the independent expenditures are not subject to regulation as an in-kind contribution, will require the creation of a “firewall” to prohibit the flow of information from the entity making coordinated expenditures to the entity making independent expenditures.

In AO-06-07, this office stated that a federal regulation concerning the creation of such a firewall, 11 CFR 109.21(h)(1), is consistent with OCPF’s previous opinions and that OCPF would tend to adhere to the approach used in the regulation when considering whether a particular expenditure is coordinated or truly independent. The regulation states:

- (1) The firewall must be designed and implemented to prohibit the flow of information about the candidate’s . . . campaign plans, projects, activities, or needs between those employees or consultants providing services . . . [for the independent expenditure] and those employees or consultants who currently provide, or previously provided, [coordinated] services for the candidate . . . ; and
- (2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants and clients affected by the policy.

The safe harbor that is established by a firewall does not apply if there is specific information indicating that, notwithstanding the firewall, either (1) information about the candidate’s campaign plans, projects, activities or needs is used to create a communication; or (2) such information about the candidate is conveyed to the person paying for the communication. See 11 CFR 109.21(h). In such circumstances, the expenditures are considered coordinated.

Given the facts that you have provided, it may be difficult to create an effective firewall that would insulate you, the organization’s sole employee, from the board members. The mailings would not appear to be coordinated, however, if Mass Alliance establishes and implements written procedures or measures that effectively prevent the flow of information about the candidate’s needs, plans, projects or activities from you to the members of the board who are involved in an issue advocacy campaign.

2. Your distribution of issue ads

An expenditure by Mass Alliance for an issue ad would generally be considered “coordinated” if it is made at the request or suggestion of the candidate, or if “the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over a communication’s (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) “volume” (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.” See IB-06-01, quoting FEC v. Christian Coalition, 52 F. Supp. 2d 45, 92 (D.D.C., 1999).

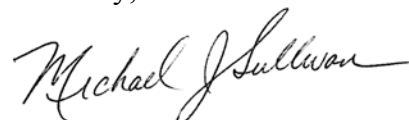
In Clifton v. Federal Election Commission, 114 F.3d 1309 (1997), the First Circuit Court of Appeals stated that a federal regulation restricting corporate contacts with candidates or candidate agents with respect to voter guides and voter records was not valid, in part because the regulation banned all communications with the candidates. The court stated that the regulation was not consistent with the First Amendment since it essentially prohibited issue advocacy by an organization because the organization has conducted interviews with candidates prior to deciding which candidates to endorse. As the court stated in Clifton, to be subject to regulation, there must be “some level of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.” Id.

Your discussions with candidates to determine their stances on issues and the viability of their campaigns does not mean, absent other circumstances indicating coordination, that your preparation or distribution of issue ads supporting the candidates should be considered an in-kind contribution by Mass Alliance. Your activities would apparently not involve “substantial discussion or negotiation” addressed in the Christian Coalition case. In addition, for the reasons discussed in Clifton, the limited nature of your contacts with candidates during the assessment interview process would not bar your being involved in the issue ads regarding these candidates.

We appreciate your interest in the campaign finance law. This opinion is based on the representations in your correspondence, and your conversations with OCPF staff, and is issued solely within the context of the Massachusetts campaign finance law.

Please do not hesitate to contact this office should you have additional questions about this or any other campaign finance matter.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Sullivan". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael J. Sullivan  
Director

MJS/gb